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7 UNITED STATES DISTRICT COURT
8 WESTERN DISTRICT OF WASHINGTON
9 AT SEATTLE

10 UNITED STATES OF AMERICA,

11 Plaintiff,

12 v.

13 RONNIE GEORGE and NANCY STONE,

14 Defendants.

No. CR11-213Z

ORDER

15
16 THIS MATTER comes before the Court on defendant Nancy Stone's motion, docket
17 no. 41, in which defendant Ronnie George joins, docket no. 44, to dismiss Counts 1 and 5 of
18 the Indictment. Having reviewed all papers filed in support of, and in opposition to, the
19 motion, the Court DENIES the motion and enters the following Order.

20 **A. Collateral Estoppel**

21 Defendants Stone and George contend that the Government is collaterally estopped
22 from disputing that defendant George is "disabled" within the meaning of the Social Security
23 Act, see 42 U.S.C. §§ 416(i) & 1382c(a)(3), by the finding of an administrative law judge
24 ("ALJ"), on May 30, 1991, that defendant George had been under a disability since April 4,
25 1990. Ex. 1 to Memorandum (docket no. 42-1 at 4). Defendants' argument lacks merit. The
26 doctrine of collateral estoppel, also known as "issue preclusion," bars relitigation of an issue

1 adjudicated in an earlier proceeding if (i) the issue was necessarily decided in the previous
2 action and is identical to the one now before the Court, (ii) the prior matter ended with a final
3 judgment on the merits, and (iii) the party against whom collateral estoppel is asserted was a
4 party or in privity with a party to the earlier case. Granite Rock Co. v. Int’l Bhd. of
5 Teamsters, Freight, Constr., Gen. Drivers, Warehousemen & Helpers, Local 287, --- F.3d ---
6 , 2011 WL 1902675 at *2 (9th Cir. May 20, 2011); United States v. Bhatia, 545 F.3d 757,
7 759
8 (9th Cir. 2008) (both res judicata and collateral estoppel “apply to criminal and civil
9 proceedings, and both require privity between the parties” (citation omitted)); see also Robi
10 v. Five Platters, Inc., 838 F.2d 318, 322 (9th Cir. 1988).

11 None of the requirements for collateral estoppel are met here. The issue before the
12 ALJ in the earlier proceeding was whether, as of May 30, 1991, defendant George had been
13 under a disability since April 4, 1990. The issue now before the Court is whether defendant
14 George intentionally concealed and failed to disclose to the Social Security Administration
15 that he was inter alia capable of and in fact working, resulting in the payment to him of
16 benefits to which he was not entitled.¹ See Superseding Indictment at ¶ 19 (docket no. 70).
17 Thus, the issues in the previous and current action are not identical. Moreover, the ALJ’s
18 conclusion that defendant George was under a disability as of May 30, 1991, is not a final
19 determination within the meaning of the collateral estoppel doctrine. A finding that an
20 individual is “under a disability” is periodically reviewed, and a determination that a
21 disability has ended may result in termination of benefits. See 42 U.S.C. § 421(i); 20 C.F.R.

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23 ¹ The Government asserts that collateral estoppel does not apply because the prior determination of disability
24 was procured through fraud, citing Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238 (1944), and
25 Abatti v. Comm’r, 859 F.2d 115 (9th Cir. 1988). The Court is not persuaded that either authority supports
26 the Government’s position; those cases did not involve collateral estoppel, but rather dealt with the authority
of a court to vacate its own decision in the presence or absence of fraud. The Court declines to further
examine whether extrinsic or intrinsic fraud might undermine the preclusive effect of a previous ruling
because any such doctrine would depend on a finding of fraud, which is the very subject of the various
criminal charges in this case and is therefore solely within the province of the jury.

1 §§ 416.994 & 416.1331; see also *Buckley v. Heckler*, 739 F.2d 1047 (5th Cir. 1984). Finally,
2 the Government was not a party to the prior proceeding, and did not have a “full and fair
3 opportunity” to litigate, *Robi*, 838 F.2d at 322, whether defendant George was (or continues
4 to be) disabled within the meaning of the Social Security Act. *Cohen v. United States*,
5 571 F. Supp. 589, 595 (S.D.N.Y. 1983) (“Social Security disability hearings are not
6 adversary proceedings in which the United States appears as a party to oppose an applicant’s
7 claim. The ALJ is not a counsel representing the Government but is an ‘examiner charged
8 with developing the facts.’” (citations omitted)); see also *United States v. Bustos*, 2011 WL
9 1525614 (9th Cir. Apr. 22, 2011). In sum, the Government is not collaterally estopped from
10 disputing that defendant George is disabled within the meaning of the Social Security Act.

11 **B. Duplicitous Counts / Statute of Limitations**

12 Defendants Stone and George also assert that Counts 1 and 5 of the original
13 Indictment, docket no. 1, are duplicitous, joining together distinct offenses, some of which
14 are beyond the statute of limitations.² The Court disagrees. An indictment is
15 unconstitutionally duplicitous if it joins in a single count “two or more distinct and separate
16 offenses.” *United States v. UCO Oil Co.*, 546 F.2d 833, 835 (9th Cir. 1976). Duplicity is
17 prohibited because it might result in a guilty verdict without requiring the jury to reach a
18 unanimous verdict on the commission of a particular offense, *id.*, and because it might permit
19 the prosecution of related but different crimes when, as to one or more of them, the statute of
20 limitations has already expired, see *United States v. Smith*, 373 F.3d 561, 563 (4th Cir. 2004);
21 see also *Toussie v. United States*, 397 U.S. 112, 114-15 (1970) (discussing the purposes of
22 statutes of limitations).

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25 ² The Superseding Indictment, docket no. 70, which was issued after defendants filed the current motion to
26 dismiss, renders moot most of defendants’ complaints about Count 5, which has been replaced by Counts 11
to 15, each of which constitutes a “representative sample” of defendants’ alleged thefts, and each of which is
alleged to have occurred within the five-year statute of limitations.

1 The question of whether a count charges only one crime or separate offenses is
2 interrelated with the issue of when the relevant statute of limitations begins to run.
3 Generally, the statute of limitations commences when a single criminal act is completed. See
4 Toussie, 397 U.S. at 115. If, however, a series of related criminal acts extend over a period
5 of time, and if they may be treated as a “continuing offense,” then the statute of limitations
6 runs from the date the continuing offense concluded. See Smith, 373 F.3d at 568; see also
7 United States v. Krstic, 558 F.3d 1010, 1017 (9th Cir. 2009) (“[P]ossessory offenses have
8 long been described as ‘continuing offenses’ that are not complete upon receipt of the
9 prohibited item. Rather, the statute of limitations does not begin to run until the possessor
10 parts with the item.”). The “continuing offense” doctrine is applied sparingly, and it may be
11 invoked only if “the explicit language of the substantive criminal statute compels such a
12 conclusion, or the nature of the crime involved is such that Congress must assuredly have
13 intended that it be treated as a continuing one.” Toussie, 397 U.S. at 115.

14 The Court is satisfied that the crimes alleged in Counts 1 and 5 of the Indictment
15 constitute continuing offenses. Although the statutes, 42 U.S.C. § 1383a(a)(3) and 18 U.S.C.
16 § 641, do not expressly indicate that the offenses at issue are continuing ones, they define
17 crimes that Congress must have intended to treat as continuing offenses. See United States v.
18 Banks, 708 F. Supp. 2d 622 (E.D. Ky. 2010). In Banks, the court was guided by the Supreme
19 Court’s seminal discussion of continuing offenses like conspiracy, in which “each day’s acts
20 bring a renewed threat of the substantive evil Congress sought to prevent.” Id. at 624 (citing
21 Toussie, 397 U.S. at 122). The court in Banks observed that, in § 1383a(a)(3), “the so-called
22 ‘renewed threat of evil Congress sought to prevent’ is wrongfully obtaining an ‘initial or
23 continued right’ to a social security benefit.” Id. Because the concealment of or failure to
24 disclose an event affecting the right to social security benefits does not result in simply one
25 undue benefit, but rather implicates “all further benefits going forward,” the offense defined
26 in § 1383a(a)(3) is a continuing one. Id.; see also Smith, 373 F.3d at 567-68 (concluding that

1 defendant, who failed to report the death of his mother and continued to receive her social
2 security benefits, was properly charged under 18 U.S.C. § 641 with a continuing offense of
3 embezzling, stealing, and converting to his own use property of the United States). Because
4 Counts 1 and 5 of the Indictment allege continuing offenses, defendants' contentions that the
5 charges are duplicitous and are barred by the statute of limitations lack merit.

6 **C. Due Process / Pre-indictment Delay**

7 Defendants raise as an additional basis for dismissal what they characterize as a
8 20-year delay in bringing the charges at issue. The Court rejects defendants' argument. The
9 Due Process Clause of the Fifth Amendment plays a limited role in protecting against pre-
10 indictment delay because "statutes of limitations provide a predictable, legislatively enacted
11 limitation on prosecutorial delay." *United States v. Sperow*, 412 Fed. Appx. 4, 5 (9th Cir.
12 2010) (citing *United States v. Lovasco*, 431 U.S. 783, 789 (1977)). To show unconstitutional
13 pre-indictment delay, a defendant must first establish that he or she "suffered actual, non-
14 speculative prejudice from the delay." *Id.* (citing *United States v. Gilbert*, 266 F.3d 1180,
15 1187 (9th Cir. 2001), and *United States v. Sherlock*, 962 F.2d 1349, 1353 (9th Cir. 1992)).
16 To satisfy this test, a defendant must demonstrate how the testimony of lost witnesses would
17 have benefitted his or her defense. *Id.* Only if a defendant meets this first prong does the
18 Court consider the other prong of the inquiry, namely "whether the delay, when balanced
19 against the prosecution's reasons for it, 'offends those 'fundamental conceptions of justice
20 which lie at the base of our civil and political institutions.'"" *Id.* (quoting *Gilbert*, 266 F.3d
21 at 1187 (quoting *Sherlock*, 962 F.2d at 1353-54)); *see id.* at 6 ("A defendant must satisfy the
22 first prong of the test before the court even considers the second prong.").

23 Because Counts 1 and 5 charge continuing offenses, defendants' assertion of a 20-year
24 delay is inaccurate, and their contention that pre-indictment delay warrants dismissal is
25 wholly lacking in merit. Moreover, with respect to their allegation of delay, defendants have
26 not made the requisite showing of actual, non-speculative prejudice. Defendants do not

1 indicate that they have attempted to locate witnesses, but have been unsuccessful due to the
2 death or unavailability of such persons, or that they have requested records, only to learn of
3 their destruction. Defendants offer only mere speculation as to what evidence might have
4 been lost. Such conjecture is simply not adequate to obtain the relief requested.

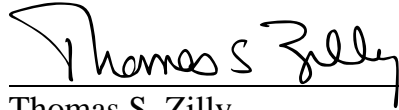
5 **Conclusion**

6 For the foregoing reasons, defendants' motion to dismiss Counts 1 and 5 of the
7 Indictment, docket nos. 41 and 44, is DENIED.

8 IT IS SO ORDERED.

9 The Clerk is directed to send a copy of this Order to all counsel of record.

10 DATED this 29th day of September, 2011.

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13 Thomas S. Zilly
14 United States District Judge
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